NORDIN BIN HASSAN

v.

SURUHANJAYA PERKHIDMATAN AWAM

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J
[ORIGINATING MOTION NO. 25-3-994]
15 DECEMBER 1994

ADMINISTRATIVE LAW: *Dismissal - Customs officer - Applicant alleged to have smuggled goods to third party - Third party charged in Court and convicted but applicant not implicated - Respondent did not consider facts of case against third party when dismissing applicant - Whether dismissal unfair - Whether applicant prejudiced - Order of dismissal - Whether to be quashed.*

This was an application by the applicant for an order of certiorari to quash the order of the respondent dismissing him from public service pursuant to disciplinary action taken against him under the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. The respondent had charged the applicant, a Customs officer, with the offence of "smuggling goods from Singapore and handing the same to one Wong Hong Hua (Wong) in Johore Bahru". The facts showed that before the dismissal, the respondent had granted the applicant's request for a hearing, but for that had only given a day's notice to the applicant. Despite the short notice, the applicant's request for a postponement was turned down and the applicant was dismissed after failing to attend the scheduled hearing.

Wong had been charged in Court and was convicted for offences in respect of the goods. The case and the charges against Wong did not in any way implicate the applicant and this was known to the respondent. In considering the charge against the applicant, however, the respondent did not consider the facts pertaining to the charges against Wong. In his application herein, the applicant argued firstly, that his dismissal in the circumstances was unfair, and secondly, that the failure of the respondent to consider the facts of the charges against Wong when dismissing him was fatal to the order of dismissal.

Held:

[1] In this case General Order 25(5) provides for oral hearing and the G.Os have legislative effect. In the circumstances of this case it cannot be said that the applicant had been properly heard. On this ground alone the applicant should succeed.

[2] The respondent should have exercised its discretion in this case by granting the adjournment requested for as the ground put forth by the applicant was reasonable and valid. Clearly by refusing the adjournment the respondent had erred in the exercise of its discretion. Dismissal is a serious matter and it is all the more reason for the respondent to allow the application for adjournment.

[3] The failure to consider the facts of the case against Wong by the respondent prejudiced the case against the applicant as such facts are relevant to the charge against the applicant. In the circumstances the decision to dismiss cannot be said to be reasonable, it being a decision that "looked objectively is so devoid of any plausible justification that no reasonable body of persons could have reached it".

[Application granted].

Cases referred to:
Najar Singh v. Government of Malaysia & Anor. [1974] 1 MLJ ***(refd)***
Lloyd. v. McMahon & Anor. [1987] 1 AC 625 (HL) ***(refd)***
Ghazi b. Mohd. Sawi v. Mohd. Haniff b. Omar, Ketua Polis Negara, Malaysia & Anor. [1994] 2 CLJ 333/[1994] 2 AMR 1277 ***(foll)***
Bromley Borough Council v. Greater London Council [1983] 1 AC 768 ***(foll)***

For the applicant - T. Balaskanda; M/s. Zaman & Associates
For the respondent - Mohd. Zawawi bin Salleh SFC

JUDGMENT

Haidar bin Mohd Noor J:

Nordin bin Hassan, the applicant, filed this originating motion after getting, by consent, leave from the Court, seeking:

1. An order of *certiorari* to remove into this Honourable Court for the purpose of it being quashed the order made by the Public Service Commission, Malaysia dated 11 January 1994 whereby the applicant was dismissed from the public service as a customs officer.

2. That the costs of and occasioned by this motion be taxed and paid by the respondent to the applicant.

It is supported by the affidavit of the applicant (encl. 4).

The applicant who worked as a customs officer with the Royal Customs & Excise Department, Johor Bahru, Johor had sixteen years service with the department. On 5 May 1993 the respondent issued a show cause letter to the applicant why he should not be dismissed or reduced in rank from the public service (see Exhibit NB1 in encl. 4). On 8 June 1993 the applicant replied to the show cause letter (see Exhibit NBH2) and at the same time requested for an oral hearing so that witnesses may be called and questioned pertaining to the charge preferred against him *vide* NBH-1.

Apparently, the respondent acceded to his request for oral hearing as the respondent wrote a latter dated 5 November 1993 instructing him to attend an oral hearing to be held on 17 November 1993 at 9.00 a.m. at Bilik Mesyuarat, Tingkat 3, Kompleks Kastam, Jabatan Kastam dan Eksais Diraja, Johor Bahru (see Exhibit NBH3). Such action would appear to be in accordance with General O. 25(5) of Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bad D) 1980. However, the applicant claimed that he received NBH3 on 16 November 1993 through one Puan Habsah bte Harun and as he was not given sufficient time to prepare his case, he requested for an adjournment through one Puan Zaleha but was told that the postponement would not be granted and the inquiry would go on. The applicant did not present himself for the oral hearing on 17 November 1993 and as a result thereof the respondent sent a letter dated 25 January 1994, through its Secretary terminating applicant's service effective 11 January 1994 (Exhibit NBH4) based obviously on the representation made by him *vide* his letter dated 6 June 1993 (Exhibit NBH2).

From para. 3 of the affidavit of Puan Habsah (encl. 8), it would appear that NBH3 was sent through the applicant's head of department on 10 November 1993 and there was no acknowledgement from him. I must stress here that the onus is on the respondent to adduce evidence of the receipt of NBH3 by the applicant especially in the face of the claim by the applicant that he received NBH3 on 16 November 1993. I would therefore have to accept the fact that the applicant received NBH3 on 16 November 1993. This fact was not seriously disputed by the Counsel for the respondent.

In respect of the application for adjournment the respondent through the affidavit of Puan Zaleha (encl. 11) denied receipt of such an application. Ideally the applicant should have presented himself at the oral hearing and then asked for adjournment and this issue of adjournment would not have been disclaimed by the respondent. I am inclined to accept the fact that the applicant did ask for adjournment and since he was told that it would not be granted, it was futile for him to present himself at the oral hearing due to the short notice. Since the issue of short notice was not disputed, should the respondent have granted the postponement or not? I am of the view that since the respondent agreed to hear oral representation by the applicant it would be unreasonable for the respondent to refuse the adjournment as after all the purpose of the oral hearing is according to G.O. 25(5) "bahawa kes terhadap pegawai itu memerlukan penjelasan selanjutnya". Therefore why the hurry to proceed with the final decision to dismiss the applicant without the oral hearing which in all probability would allow the respondent to consider adequately his defence and eventually a fair decision could be arrived at. If the oral hearing had been held and decision taken thereafter to dismiss the applicant, then I see no good grounds for the applicant to complain. I am conscious that the Court should be slow in disturbing the exercise of a discretionary power by the respondent. However in my view the respondent should have exercised its discretion in this case by granting the adjournment as the ground put forth was reasonable and valid. In the circumstances I am of the opinion that the respondent erred in the exercise of its discretion which would have been a ground for a complaint of unfairness. In this respect Suffian CJ (as he then was) in the Federal Court case of *Najar Singh v. Government of Malaysia & Anor.* [1974] 1 MLJ at p. 141 said:

> ...There is no evidence here that the plaintiff ever demanded an oral hearing before his dismissal. If he had been refused, then probably he would have had a stronger case,...

Here the applicant asked for an oral hearing and the respondent thought it fit to accede to such a request as provided by G.O. 25(5) but shut it out purely because the applicant asked for an adjournment. As dismissal is a serious matter it is the more reason for the respondent to allow the application for adjournment as after all it was the first of such an application.

The case of *Lloyd. v. McMahon & Anor.* [1987] 1 AC 625 (HL) was considered and followed by our Supreme Court in *Ghazi b. Mohd. Sawi v. Mohd. Haniff b. Omar, Ketua Polis Negara, Malaysia & Anor.* [1994] 2 CLJ 333/[1994] 2 AMR where at p. 1277, the Court stated:

> In that case when the learned Chief Justice said "in the circumstances of that case" he was only referring to the fact that there was no evidence that the plaintiff ever demanded an oral hearing before his dismissal and that if he had and been refused then probably the plaintiff would have a stronger case. On this point it is interesting to note that Lord Bridge of Harwich in *Lloyd v. McMahon & Anor*. [1987] 1 AC 625 (HL)(E) at p. 706 made the same *dictum* as the learned Chief Justice in the following words:
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> > ...If any counsellor had wanted to put forward his own independent and individual grounds in rebuttal of the charge of wilful misconduct against himself, I have no doubt he would have done so. If any counsellor had asked to be heard orally and the auditor had refused, there would have been clear ground for a complaint of unfairness...
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> Lest we forget, in that case his Lordship was dealing with judicial review at common law and the passage above does not apply to a case regulated by statutes or subsidiary legislation which have legislative effect.

It is to be noted, however, that in this case G.O. 25(5) provides for oral hearing and the G.O.s have legislative effect. It cannot, in my view, be said that the applicant in the circumstances had been properly heard. On this ground alone the applicant should succeed.

Assuming I am wrong, I will then next consider the issue of whether the applicant was unreasonably dismissed. The test of "unreasonableness" was considered at length by our Supreme Court in *Ghazi bin Mohd. Sawi's* case, *supra*, where it, *inter alia*, said at p. 1270:

> As we have pointed out in the case of *Harpers Trading (M) Sdn. Bhd. v. National Union of Commercial Workers* [1991] 1 MLJ 417 in law, there are two categories of unreasonableness one of which is referred to as comprehensive unreasonableness and the other is a distinct category of unreasonableness altogether which, with reference to a decision, amounts to an absurd or perverted decision which is a perverse finding, so devoid of plausible justification that no reasonable body of persons could have reached it.

Now, the charge preferred against the applicant reads:

> Bahawa tuan, Nordin bin Hassan, semasan, semasa bertugas sebagai Pegawai Kastam T/Biasa, Jabatan Kastam dan Eksais Diraja, Johor Bahru pada 12 October 1989 telah menyeludup barang-barang seperti di Lampiran 'A' dari Singapura dan menyerahkan barang-barang teersebut keapda seorang bernama Wong Hong Hua (No. Kad Pengenalan 5474819) di tepi jalan dekat Taman Daya, Johor Bahru. Perbuatan tuan itu telah diintip oleh pihak Jabatn Kastam dan Eksais Diraja, Johor Bahru. Perbuatan tuan itu adalah satu kesalahan yang tidak bertanggungjawab iaitu bertentangan dengan Perintah Am 4 (2) (g), Perintah-Perintah Am Pegawai Awam (kelakuan dan Tatatertib) (Bad 'D'), 1980.

In the said charge the applicant was alleged to have smuggled and gave the goods as listed in Lampiran 'A' to one Wong Hong Hua on 12 October 1989 in Johor Bahru. This Wong Hong Hua was arrested on 12 October 1989 in Johor Bahru and subsequently charged in the Magistrate's Court, Johor Bahru in respect of the goods as listed in Lampiran 'A'. Two charges were preferred against this Wong Hong Hua and he pleaded guilty to both charges and sentenced accordingly. In the facts of the case in respect of the two charges presented by the prosecution to the Court (see Exhibit NBH-5) the applicant was not implicated. However, the respondent by way of para. 9 of the affidavit Abdul Rahman (encl. 7) deposed that in considering the charge against the applicant the facts pertaining to the charges against Wong Hong Hua were not considered by the respondent. It was the contention of the applicant that the respondent. It was the contention of the applicant that the respondent should have considered the facts of the case against Wong Hong Hua as they were relevant to the charge against the applicant as the subject matter i.e., the goods were the same. Had the respondent considered those facts, it would seem clear that the charge against the applicant would not succeed as he was not implicated at all. I am inclined to accept the contention of the applicant for the following reasons:

(1) Even though according to the respondent the conduct of the applicant was observed or spied by Jabatan Kastam dan Eksais Diraja, the applicant was never apprehended by the Jabatan and in that event I do not see how the respondent could claim, if it is true, that those goods were smuggled by the applicant from Singapore. It is easy to make such an allegation. That could possibly have prompted the respondent to agree for further clarification in accordance with G.O. 25(5).

(2) As the goods allegedly smuggled were the same in respect of the charges against Wong Hong Hua and the charge against the applicant, the facts of the case against Wong Hong Hua should be relevant in considering the charge against the applicant as they will show the part allegedly played by the applicant, if true, in the commission of the offences by Wong Hong Hua.

(3) It could well be argued that instead of charging the applicant for abetment of the charges against Wong Hong Hua, the respondent elected to proceed by way of disciplinary action. However, the respondent did not say so.

In the circumstances the failure to consider the facts of the case against Wong Hong Hua by the respondent prejudiced the case against the applicant. Such facts, as I said earlier, are relevant to the charge against the applicant. Apart from the evidence of spying by Jabatan Kastam dan Eksais Diraja, there would appear to be no other evidence and hence the necessity of further clarification and I should think, rightly so. It is not a straight forward charge as the respondent seemed to make it out. In the circumstances the decision cannot therefore be said to be reasonable and in the words of Lord Diplock in *Bromley Borough Council v. Greater London Council* [1983] 1 AC 768 "...and decisions that looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them".

For the reasons set out by me, this is a case where the Court should properly interfere and I would accordingly allow for an order of *certiorari* to quash the order of the respondent made on 11 January 1994 dismissing the applicant from the public service as a customs officer. Costs of the proceedings to the applicant.